STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

ARNOLD MUNDT and
MARGARET MUNDT, his wife,

Plaintiffs,

vs. Case No. 2005-3730-NO

ACTIVE PROPERTY MANAGEMENT,
MAPLE LANE VALLEY III CONDOMINIUM
ASSOCIATION and TRI-SCAPE
LANDSCAPE, LLC,

Defendants,

and

ACTIVE PROPERTY MANAGEMENT and
MAPLE LANE VALLEY III CONDOMINIUM
ASSOCIATION,

Defendant/Cross-Plaintiffs,

vs.

TRI-SCAPE LANDSAPE, LLC,

Defendant/Cross-Defendant.
_____/

OPINION AND ORDER

Defendant Active Property Management ("Active") has filed a motion for summary disposition pursuant to MCR 2.116(C) (10). Defendant Tri-Scape Landscape, LLC ("Tri-

Scape") concurs in Active's motion and requests summary disposition be granted in its favor.[1] Plaintiffs request the Court deny Defendants' motions.[2]

Plaintiff resides within the Maple Lane condominium complex. On January 24, 2005, Plaintiff was injured when he slipped and fell on snow and ice while attempted to retrieve his mail from his mailbox located alongside the road inside the condominium complex. On December 2, 2005, Plaintiff filed his complaint against Defendants. Plaintiff alleges Active, as the management company responsible for snow and ice removal for the Maple Lane Valley III Condominium Association ("Maple Valley"), failed to maintain the premises in a reasonably safe condition, and also contrary to Michigan statutory law requiring premises to be fit for the use intended by the parties. Plaintiff also alleges Maple Valley breached the same duty. Plaintiff further alleges that Tri-Scape, as the landscaping company hired by Active and/or Maple Valley, committed negligence by piling snow around the mailbox.

Active contends that summary disposition is appropriate on the basis that Plaintiff cannot establish that it owed a duty to Plaintiff since the alleged danger that caused Plaintiff's fall constitutes as an open and obvious condition. Tri-Scape concurs in Active's argument. Tri-Scape also contends that summary disposition is appropriate on Plaintiff's claims on the basis that a contractual duty is insufficient to establish a duty for tort.

Plaintiff responds by contending that the open and obvious doctrine is inapplicable to cases involving a statutory duty. Plaintiff also contends that special aspects of the snow and ice made the alleged dangerous condition an unreasonably dangerous condition, and liability should be imposed despite the open and obvious nature of the snow and ice.

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[1] For simplicity, the Court will refer to Active and Tri-Scape collectively as "Defendants".
[2] Plaintiff Margaret Mundt's claim for loss of consortium is derivative of her husband, Arnold Mundt's claims. Therefore, the Court will refer to Arnold Mundt as "Plaintiff".

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Even though invitors have a duty to exercise reasonable care in protecting their invitees, they are not absolute insurers of the safety of their invitees. *Bertrand v Alan Ford,* Inc, 449 Mich 606, 614; 537 NW2d 185 (1995). A premises invitor owes no duty to protect or warn the invitee of open and obvious dangers unless he should anticipate the harm despite knowledge of it on behalf of the invitee. Lugo, at 516. The open and obvious doctrine should not be viewed as some type of 'exception' to the duty generally owed invitees, but rather as an integral part of the definition of that duty. *Lugo*, at 516. The test to determine if a danger is open and obvious is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions

to protect invitees from that risk. *Lugo*, at 517. If a danger is deemed open and obvious, the critical question is whether there is evidence that creates a genuine issue of material fact whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the "special aspect" of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. Only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine. *Id.*, at 519.[3] This doctrine applied to an open and obvious accumulation of snow and ice means that a premises possessor must take reasonable steps within a reasonable period of time after the accumulation of snow and ice has arisen to lessen the hazard of injury only if there is some "special aspect" that makes condition "unreasonably dangerous." *Mann v Shusteric Enterprises, Inc,* 470 Mich 320, 332; 683 NW2d 573 (2004). An open and obvious accumulation of snow and ice, by itself, does not feature any special aspects. *Robertson v Blue Water Oil Co,* 268 Mich App 588, 593; 708 NW2d 749 (2005), citing *Mann, supra* at 332-333. Similarly, in *Kenny v Katz Funeral Home Inc,* 472 Mich 929; 697 NW2d 526 (2005), our Supreme Court concluded that black ice is an open and obvious condition.

Since Plaintiff is not contesting the open and obvious nature of the snowy conditions that caused Plaintiff's fall, the Court will first address whether the open and obvious doctrine is inapplicable because Defendants had a statutory duty to maintain the premises in a condition fit for the use intended by the parties. The open and obvious doctrine may not be used to avoid a

[3] The Court gave two illustrations of "special aspects" where an obvious condition will not bar liability: one where the only entrance to a commercial building for the public is covered with standing water, making the danger effectively unavoidable; and the other where the condition imposes an "unreasonably high risk of severe harm" despite its obvious condition. *Lugo*, at 518.

statutory duty. *Woodbury v. Brucker*, 467 Mich 922; 658 NW2d 482 (2002), citing *Jones v. Enertel, Inc*, 467 Mich. 266, 270; 650 NW2d 334 (2002). The Michigan Court of Appeals has applied this legal principle to a private landowner's statutory duty under MCL 554.139(1), in *O'Donnell v. Garasic*, 259 Mich App 569; 676 NW2d 213 (2003). The Court in *O'Donnell* held that:

> The open and obvious danger doctrine is not available to deny liability to an injured invitee or licensee on leased or licensed residential premises when such premises present a material breach of the specific statutory duty imposed on owners of residential properties to maintain their premises in reasonable repair and in accordance with the health and safety laws, as provided in MCL 554.139(1)(a) and (b). At 581.

MCL 554.139 provides in pertinent part:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants willful or irresponsible conduct or lack of conduct.
>
> (2) The parties to the lease or license may modify the obligations imposed by this section where the lease or license has a current term of at least 1 year.

When interpreting a statute, the legislature's intent must be given effect. *People v Herron*, 464 Mich 593, 628 NW2d 528 (2001). The statute should not be construed to render another provision of the same statute superfluous or nugatory. *Danto v Michigan Board of Medicine*, 168 Mich App 438, 425 NW2d 171 (1988). Where the language of the statute is

unambiguous, the statute must be enforced as written, and the words must be given their plain and ordinary meaning. *People v Morey*, 461 Mich 325, 603 NW2d 250 (1999).

The Court is satisfied that MCL 554.139 is inapplicable to the case at hand. It is clear that MCL 554.139 is only applicable to lease or licenses of residential premises by the plain language of the statute. Since Plaintiff did not lease the premises, MCL 554.139 is inapplicable. In addition, in *Teufel v Watkins* 267 Mich App. 425; 705 NW2d 164 (2005), the Court held that accumulation of snow and ice is not a defect in the premises, and therefore a lessor's duty under MCL 554.139(1) does not extend to snow and ice removal.

The Court will next address whether the snow and ice that caused Plaintiff's fall should be considered as an unreasonably dangerous condition. At his deposition, Plaintiff testified that he drove to the mailbox, stopped his car, and walked in front of the vehicle where he fell. Plaintiff testified that approximately twelve inches of snow had fallen a day or two prior to getting the mail, and that the snow was piled up in front of the mailbox approximately knee high. (Pl. dep., pp. 19, 42). Plaintiff testified that he avoided stepping in the knee-high snow by stepping in footprints left from other people retrieving their mail. However, Plaintiff testified that he fell in front of his vehicle where the snow was approximately one inch deep *before* retrieving his mail. (Pl. dep., pp. 42-43). Plaintiff testified that he could have retrieved his mail by reaching from the passenger window without getting out of his vehicle, or by driving the opposite way to pick up the mail from the driver's side window. (Pl. dep., pp. 17-19). Based upon this testimony, the Court is satisfied that a reasonable factfinder could not conclude that Plaintiff's fall was the result of an unreasonably dangerous condition. Consequently, the danger was open and obvious, effectively avoidable, and did not pose a uniquely high likelihood of

harm or severity of harm. Therefore, Active's motion for summary disposition should be granted.[4]

The Court is also satisfied that Plaintiff has failed to establish a question of fact exists as to his claim against Tri-Scape. Assuming arguendo that Tri-Scape plowed snow in front of Plaintiff's mailbox and that this constituted as negligence, Plaintiff is unable to establish a question of fact that his fall was proximately caused by Tri-Scape's alleged negligence. As mentioned above, Plaintiff testified that he fell prior to reaching the plowed in mailbox, and instead fell in front of his car in one inch of snow and ice in the street. Consequently, Tri-Scape's motion for summary disposition should be granted.

Based upon the reasons set forth above, Defendants' motion for summary disposition is GRANTED. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order resolves the last claim and closes the case.

IT IS SO ORDERED.

Dated: August 9, 2006

DONALD G. MILLER
Circuit Court Judge

CC: Armin G. Fischer
Dale J. McLellan
Cecil D. St. Pierre, Jr.

DONALD G. MILLER
CIRCUIT JUDGE

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[4] The Court is satisfied that Tri-Scape may not rely on the open and obvious doctrine as it only applies to the duty of a premises possessor to invitees. See *Ghaffari v Turner Construction Co*, 473 Mich 16; 699 NW2d 687 (2005). Consequently, Tri-Scape's motion for summary disposition based upon this argument should be denied.